U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 03 2007
SRC 06 183 51842

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology consulting and development company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner had not submitted the requested evidence, documentation that the beneficiary has the required degree.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) does not have the authority to question a credentials evaluation and that the director failed to explain why she did not accept the credential submitted. Counsel submits evidence regarding Indian three-year degrees. We note that the basis of the director's decision is that the record lacks evidence that the beneficiary received any degree at all. As will be discussed below, we concur with that determination.

The evidence of record does not support the findings that the beneficiary has any degree at all, let alone a Bachelor of Science in Computer Science. The transcript evaluated in this matter fails to indicate a degree was awarded and the record lacks a diploma. In addition, the transcript reveals that the beneficiary failed several of the courses he took over six semesters, most of which he did not retake. Further, the beneficiary did not take a single computer science course and the evaluations acknowledge that the beneficiary's major field of study was Chemistry. Thus, we find the evaluations both internally inconsistent and inconsistent with the record.

Decisions by federal circuit courts have acknowledged our authority to evaluate whether the beneficiary is qualified for the job offered and we adopt their interpretation on this issue. Moreover, contrary to counsel's appellate assertion, agency precedent decisions that are binding on all CIS officers support CIS' ability to discount expert opinions that are questionable or not supported by the record. The serious and unresolved factual inconsistencies in the evaluations diminish the overall credibility of the individuals preparing the evaluations. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, we need not give any evidentiary weight to their assertion that the beneficiary's three-year degree is equivalent to a U.S. four-year baccalaureate. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817, 870 (Commr., 1988); *Matter of Shah*, 17 I&N Dec. 244, 245 (Regl. Commr. 1977). Moreover, as will be discussed further below, their position is inconsistent with the precedent decision, *Matter of Shah*, that is binding on this office.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree

followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Issues to be Addressed

The beneficiary claims to possess a foreign three-year bachelor's degree. Thus, the first issue, and the one raised by the director, is whether the beneficiary actually received that degree. An application or petition that fails to comply with the technical requirements of the law, however, may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Thus, we will also examine whether the beneficiary's degree is a foreign degree equivalent to a U.S. baccalaureate degree in the fields specified on the alien employment certification. Finally, we will also examine whether the petitioner submitted the required initial evidence relating to its ability to pay the proffered wage as of the priority date in this matter.

Required Initial Evidence

The regulation at 8 C.F.R. § 204.5(k)(3)(i) provides that a petition seeking to classify an alien as a professional holding an advanced degree through the bachelor plus five equivalency "must" be accompanied by:

> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The petitioner did submit the official academic record of the beneficiary's coursework at Loyola College, Madras. The transcript shows six semesters of coursework. During this time, the beneficiary failed General Math I, General Math II, General Physics II, Physical Chemistry I, Physical Chemistry II and Organic Chemistry III. While the beneficiary also initially failed French, he subsequently passed it. The academic record does not indicate that the beneficiary received any degree in recognition of these studies. Significantly, the beneficiary failed all of his math courses and three courses within his alleged major field of study, Physical Chemistry I and II and Organic Chemistry III. The two evaluations, from [redacted] of Career Consulting International and [redacted] of Marquess Educational Consultants, equate this education to a U.S. baccalaureate in computer science, a subject the beneficiary never took. Both evaluations claim to be evaluating this transcript and the beneficiary's affidavit affirming that he was awarded a Bachelor of Science from Loyola College, Madras. The beneficiary's affidavit is not part of the record.

The regulation at 8 C.F.R. § 103.2(b)(2) provides:

> *Submitting secondary evidence and affidavits.* (i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The petitioner has not demonstrated that primary evidence of the beneficiary's degree from Loyola College, Madras, is unavailable or does not exist. Moreover, the petitioner has not demonstrated that secondary evidence of this degree is unavailable or does not exist. Thus, the petitioner may not rely on affidavits. Furthermore, the petitioner did not submit the beneficiary's affidavit. Finally, the beneficiary is an interested party and [redacted] do not claim direct personal knowledge of the beneficiary's education. Thus, the beneficiary's affidavit, even if it had been submitted, and the assertions of [redacted] are insufficient evidence that the beneficiary received the degree claimed. We reach this conclusion without reaching any conclusion as to whether the evaluations of the equivalency of the alleged degree have merit.

That said, the evaluations do not explain how the beneficiary could have received even a three-year degree after failing all of his math courses and three courses within his major field of study. This serious inconsistency between the evaluations and the record is highly problematic. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

In light of the above, we uphold the director's denial based on the failure of the petitioner to submit the required initial evidence in this matter, the beneficiary's degree. This failure cannot be overcome as the petitioner did not comply with the requirements set forth at 8 C.F.R. § 103.2(b)(2). Without an academic record of the beneficiary's degree, the equivalency of that degree in the United States is moot. Nevertheless, the inconsistencies in the evaluations of the beneficiary's alleged degree warrant further discussion. As stated above, our justification for examining issues beyond those discussed by the director derives from *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043 and *Dor*, 891 F.2d at 1002 n. 9 (2d Cir. 1989).

Qualifications for the Job Offered

As noted above, the ETA Form 9089 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> (a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:
>
> > (1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for the job offered. This fact has not gone unnoticed by federal circuit courts. In *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983), the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

Id. See also Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. In a subsequent case, the Ninth Circuit, citing *K.R.K. Irvine, Inc.*, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. [Section] 212(a)(14) [of the Act], 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Thus, at least two circuits have held that CIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those circuit decisions provide persuasive authority that will be followed in this matter.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a Master's degree is the minimum level of education required. Line 4(A) reveals that the major field of study must be computer science. Line 7 reflects that alternate fields of study include engineering and business administration. Line 8 reflects that a combination of education or experience is acceptable in the alternative. Lines 8(A) and 8(B) reflect that the alternative education and experience include a bachelor's degree and five years of experience. Line 9 reflects that a foreign educational equivalent is acceptable.

To determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. *Madany*, 696 F.2d at 1012; *K.R.K. Irvine, Inc.*, 699 F.2d at 1008; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981); *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Commr. 1986). CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Commr. 1986); *Madany,* 696 F. 2d at 1015.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. CIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). CIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

As stated above, both evaluations state that the beneficiary's major while studying at Loyola College, Madras was chemistry. Both evaluations conclude, however, that the beneficiary's alleged degree is equivalent to a U.S. baccalaureate in computer science. As stated above, the beneficiary's transcript lists no computer courses. [redacted] provides no explanation for her conclusion that a degree in chemistry can be considered equivalent to a degree in computer science. [redacted] explains that he reached his conclusion on the basis that a degree in chemistry can be used as admission to a Master's program in computer science.

As stated above, CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

[redacted] assertion is logically flawed. [redacted] does not purport to be evaluating the beneficiary's education in chemistry and five years of experience in computer science as equivalent to a Master's degree in computer science. Rather, he purports to be evaluating the undergraduate degree by itself. It defies logic to suggest that a degree in one field that could serve as sufficient education for admission to a degree program in a second field is actually a degree in that second field. The fact that admission to a computer science program may have been an option for the beneficiary does not convert his degree in chemistry to one in computer science. It is simply not persuasive to imply that the beneficiary, by studying chemistry, gained the knowledge and skills in computer science that he would have gained studying computer science. Applying [redacted] assertion to its logical end, the beneficiary must also be considered to have a bachelor's degree in a broad range of fields since an undergraduate degree in chemistry can earn admission to a variety of graduate programs, such as medicine. Such a result is untenable.

In light of the above, the petitioner has not established that the beneficiary has a degree in computer science, engineering or business administration. Thus, he does not meet the requirements of the alien employment certification.

Eligibility for the Classification Sought

As discussed above, the above inquiries assigned to DOL are limited. Federal circuit courts have recognized that CIS has the responsibility of determining whether the alien is qualified for the classification sought. As stated in *Madany*, 696 F.2d at 1012-1013:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Id.

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act with anything less than a full baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. at 245. The Joint Explanatory Statement of the Committee of Conference provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990). At the time of enactment in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorilland v. Pons*, 434 U.S. 575, 580 (1978)(Congress is presumed to be aware of administrative and judicial interpretations).

Thus, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Both [redacted] assert that the Indian three-year degree is equivalent to a U.S. baccalaureate. As stated above, however, the claims by [redacted] discussed above are so illogical and unsupported as to diminish their overall credibility. *See generally Matter of Ho*,

19 I&N Dec. at 591-92. Moreover, their assertions on the equivalency of the three-year degrees in general are not sufficiently supported to overcome the holding in *Matter of Shah*, 17 I&N Dec. at 245.

[redacted] note the existence of three-year undergraduate degrees in Europe and even accelerated baccalaureate programs in the United States. [redacted] further asserts: "UNESCO clearly recommends that the 3 and 4 year [Indian] degree should be treated as equivalent to a bachelor's degree by all UNESCO members." She provides three website addresses in support of this assertion and subsequently quotes the following UNESCO recommendation:

> Member States should take all feasible steps within the framework of their national systems and in conformity with their constitutional, legal and regulatory provisions to encourage the competent authorities concerned to give recognition, as defined in paragraph 1(e), to qualifications in higher education that are awarded in the other Member States.

[redacted] does not provide sufficient context for us to determine whether or not the UNESCO recommendation is limited to admission into graduate education or whether it also applies to eligibility for employment and immigration benefits.

[redacted] relies on a paper coauthored with [redacted] entitled "Does the Value of Your Degree Depend on the Color of Your Skin?" The paper is not part of the record and the petitioner provides no evidence that this article has been published or that official bodies, such as the American Evaluation Association, have adopted its conclusions. While [redacted] identifies several U.S. accredited universities that accept three-year degrees for admission to graduate school, the limited list suggests that there are still many U.S. universities, such as the University of Washington,[1] that do not. [redacted] also notes that some U.S. universities offer accelerated baccalaureate programs that may be completed in three years. [redacted] provides no evidence, however, that Loyola College, Madras, offers a four-year baccalaureate that may, through an accelerated program, be completed in only three years.

The evaluations provided by [redacted] and [redacted] do not overcome the precedent decision, *Matter of Shah*, 17 I&N Dec. at 245, which is binding on this office.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," pursuant to 8 C.F.R. § 204.5(k)(3)(i), the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

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[1] The response from [redacted] referenced by [redacted] reveals that the University of Washington does not consider a three-year B.A. plus one year of a two-year Master's program to be equivalent to a U.S. baccalaureate.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," as required by 8 C.F.R. § 204.5(k)(3)(i). In fact, the petitioner has not established that the beneficiary has any degree at all. Thus, the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, even if we accepted that the beneficiary received the degree claimed, the beneficiary does not meet the job requirements on the alien employment certification.

Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on September 19, 2005. The proffered wage as stated on the ETA Form 9089 is $32.65 per hour, which amounts to $67,912 annually. On Part K of the ETA Form 9089, signed by the beneficiary on May 8, 2006, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1998, a gross annual income of $2,200,000, a net income of $500.00 and 20 employees. In support of the petition, the petitioner submitted pay stubs issued by the petitioner to the beneficiary for January 2006 through April 2006. All of the pay stubs reflect gross wages of $2,708 biweekly, or $33.85 per hour.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), CIS will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage prior to January 2006. As stated above, the priority date in this matter is September 19, 2005. Regardless, the petitioner did not submit the initial required evidence set forth in the regulation at 8 C.F.R. § 204.5(g)(2). Specifically, the petitioner did not submit its federal tax returns, audited financial statements or annual reports for any year.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2005 or subsequently. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.